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# In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT E. MURPHY, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the court below erred in applying a test of actual bias, rather than implied bias, to a challenge for cause against a court-martial panel member.

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINIONS BELOW

The initial opinion of the Court of Military Appeals (Pet. App. 8a-18a) is reported at 26 M.J. 454. The order of the Court of Military Appeals affirming petitioner's conviction (Pet. App. 22a) is reported at 27 M.J. 448. The initial opinions of the Air Force Court of Military Review (Pet. App. 1a-3a, 4a-7a) are reported at 23 M.J. 690 and 23 M.J. 764. The opinion of the Air Force Court of Military Review on remand (Pet. App. 19a-21a) is unreported.

## JURISDICTION

The judgment of the Court of Military Appeals was entered on March 9, 1989. The petition for a writ of certiorari was filed on April 19, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1987).

## STATEMENT

1. An efficiency report is generally prepared for each servicemember every 12 months. That servicemember's immediate supervisor, commonly known as the "rater," is responsible for writing the report. The report is sent to the next highest supervisor in the chain of command. That person, known as the "additional rater," must evaluate and comment on the ratee's performance. Thereafter, the efficiency report is placed in the servicemember's personnel file or is sent to the next highest official for his endorsement. The question in this case is whether a servicemember who serves as the "rater" or as an "additional rater" of another panel member is impliedly biased and therefore must be excused from a court-martial panel even in the absence of any showing of actual bias on his part.

2. Petitioner, a member of the United States Air Force, pleaded guilty to four counts of taking indecent liberties with a child under the age of 16, seven counts of committing indecent acts on a child under the age of 16, one count of sodomy with a child under the age of 16, and one count of assault, in violation of Articles 134, 125, and 128 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934, 925, and 928. Petitioner chose to have his sentence imposed by a court-martial panel composed entirely of officers,[1] and eight officers were detailed as panel members.

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[1] An enlisted serviceman has the right to a court-martial panel composed of at least one-third enlisted members from a different unit. Art. 25(c)(1), UCMJ, 10 U.S.C. 825(c)(1). The trial judge explained that option to petitioner, Tr. 5-6, but petitioner did not exercise it. Tr. 6.

During voir dire, one officer, Colonel Coleman, said that if his superior was absent for a prolonged period of time, he would conceivably be in a position to be an additional rater on another panel member's efficiency report. Tr. 83, 110. Another officer, Colonel Andrews, said that he was the rater for one junior panel member and was the additional rater for another. Tr. 84. Based on those facts, the trial judge and counsel for both the prosecution and the defense questioned Colonels Coleman and Andrews, as well as the junior panel members, at length. Tr. 82-85, 104-105, 108-111, 119-122.

The two panel members who could have been rated by Colonel Coleman both said they would not feel inhibited in any way in performing their duties as panel members. Tr. 83. The two panel members who were rated by Colonel Andrews each affirmatively said that they, too, would not feel inhibited in any way about carrying out their responsibilities as panel members, and that they could express their views without any reservation. Tr. 85, 104. Colonel Coleman said that he would not feel embarrassed or inhibited in any way if the junior panel members disagreed with him during their deliberations, and that he would not attempt to use his rank or position to influence their decision. Tr. 84, 105, 110-111. Likewise, Colonel Andrews told the trial judge that he would not use his rank or position to influence the junior panel members to change their opinions. He recognized that they had the right to disagree with him and that the case should be decided based on the evidence and the judge's instructions. Tr. 121.

The defense challenged Colonels Coleman and Andrews for cause, based on their relationship with the other panel members. Tr. 122-123. The trial judge denied the challenges. The judge said that he had ob-

served Colonels Coleman and Andrews during voir dire and that he was "most impressed with their demeanor and most impressed with their desire to put those matters aside and decide the case based solely on the evidence without regard to their relationships with these individuals." Tr. 123. Petitioner was sentenced to confinement for ten years, a dishonorable discharge, and a reduction in rank to airman basic.

3. The Air Force Court of Military Review ruled that the trial judge had erred by not excusing Colonel Andrews, because he was responsible for writing or endorsing the efficiency report of another panel member. Relying on *United States* v. *Harris*, 13 M.J. 288 (C.M.A. 1982), the court of military review held that a rater is per se disqualified from serving on a panel that also contains a ratee. Pet. App. 2a-3a, 6a. The government appealed to the Court of Military Appeals, which reversed. *Id.* at 8a-18a. That court held that there is no such per se rule of disqualification and that *Harris* did not adopt one. *Id.* at 10a-12a, 16a-17a. The court also held that the trial judge correctly denied the challenges for cause on the facts of the case. *Id.* at 12a-13a.[2]

## ARGUMENT

Petitioner claims that he was denied a fair hearing on his sentence because the trial judge improperly de-

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[2] The Court of Military Appeals remanded the case to the court of military review to determine the appropriateness of the sentence. See Art. 66, UCMJ, 10 U.S.C. 866. On remand, the court of military review affirmed the sentence. Pet. App. 20a-21a. The Court of Military Appeals again granted review and summarily affirmed. *Id.* at 22a.

nied two challenges for cause against panel members. Petitioner's claim, however, is quite narrow. He does not contend that the officers in question were actually biased or unable to be impartial in reviewing the evidence and deciding on his sentence. Instead, petitioner argues that Colonels Coleman and Andrews should have been excused solely because of their positions as reviewers of the efficiency reports of other panel members.[3] Petitioner's claim that their status justifies a per se rule of disqualification lacks merit and does not warrant further review.[4]

This Court has consistently refused to adopt a rule of implied juror bias in similar contexts. For example, in *Dennis* v. *United States*, 339 U.S. 162 (1950), a case involving a contempt conviction for failing to appear before the House Committee on Un-American Activities, the Court rejected the argument that the jury, composed primarily of employees of the United States, was inherently biased. Dennis argued that the employees, who were subject to an executive order providing for their discharge upon reasonable grounds to believe that they were disloyal to the government, would not risk being dismissed by voting for acquittal. The Court rejected that claim of implied bias, noting that the "way is open

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[3] Curiously, petitioner decided to challenge the two senior officers, rather than the junior officers who could be subject to being rated by the senior officers. It is difficult to fathom how the senior officers could be considered biased because of their role in the rating system; it is presumably the junior officers, not the senior officers, who are subject to potential command influence.

[4] A similar question is presented in the petition in *Evans* v. *United States*, No. 88-6638.

in every case to raise a contention of bias" and that Dennis had failed to show actual bias. 339 U.S. at 168. More recently, in *Smith* v. *Phillips*, 455 U.S. 209 (1982), the Court rejected the contention that bias should be imputed to a juror who had an application for employment pending with the prosecuting attorney's office. The Court stated that the "safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge," while not infallible, adequately protect the right to an impartial jury. *Id.* at 217. See also *Chandler* v. *Florida*, 449 U.S. 560 (1981) (jurors in a televised trial not inherently biased toward conviction); *Frazier* v. *United States*, 335 U.S. 497 (1948) (a jury composed entirely of government employees, including one juror and the wife of another person who were employed by the department responsible for enforcing the Act in question, is not impliedly biased); *United States* v. *Wood*, 299 U.S. 123 (1936) (government employees are not impliedly biased).[5]

In this case, the trial judge focused on the question whether the panel members at issue would improperly influence the junior panel members (as well as the reverse), the judge found no such indication, and petitioner does not suggest that there was any improper influence or intimidation in this case. The decision of the Court of Military Appeals is therefore consistent with this Court's precedents.

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[5] Petitioner errs in relying on *Tumey* v. *Ohio*, 273 U.S. 510 (1927). Pet. 6. That case involved the legality of a procedure by which the town mayor's compensation depended on the amount of fines he collected as a judge. The procedure here is not remotely similar to the one in *Tumey*.

In addition, as that court noted, there are several additional safeguards in the military justice system to prevent the type of improper influence that petitioner fears. Article 37 of the UCMJ, 10 U.S.C. 837, forbids an officer from attempting to influence the actions of a court-martial panel member and also prohibits consideration of performance as panel members by rating officers. Article 51, UCMJ, 10 U.S.C. 851, provides that court-martial panel members must vote by secret written ballot. And Article 98, UCMJ, 10 U.S.C. 898, makes it a crime to violate any provision of the UCMJ regulating court-martial proceedings. Those provisions, in addition to the voir dire of panel members, are adequate to protect a servicemember's right to a fair consideration of his guilt or sentence. Accordingly, petitioner's claim does not warrant further review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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